

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NILA GRIEVE

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE

Insurance Carrier

Docket Nos. 255,078 &
262,887

ORDER

Claimant requested review of the May 19, 2006 Review and Modification and Post-Award Medical Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 18, 2007 in Wichita, Kansas.¹

APPEARANCES

Brian D. Pistotnik, of Wichita, Kansas, appeared for the claimant. Kendall R. Cunningham, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ This case was originally scheduled for oral arguments on August 18, 2006. The parties advised the Board that a settlement was pending and asked that oral arguments be delayed. After it became clear the settlement would not be completed the Board rescheduled this matter for oral argument.

ISSUES

The ALJ concluded the claimant **“failed to sustain her burden of proof that she has any additional functional impairment, work disability, or is permanently and totally disabled as a result the progression of her work-related conditions since the settlement hearing held December 27, 2001”**.² Nonetheless, he went on to order the respondent to pay for the claimant’s medical expenses and to reimburse the claimant for her out of pocket expenses. Finally, the ALJ ordered respondent to pay claimant 2 weeks of temporary total disability (TTD) for each of the four surgeries she had on September 9, 2004, November 8, 2004, November 29, 2004 and June 6, 2005.³

The claimant requests review of the ALJ’s Award. She maintains she is permanently and totally disabled under K.S.A. 44-510c as a result of her underlying injury.⁴

Respondent agrees the ALJ’s Award should be affirmed. Respondent contends there is no evidence that the claimant’s permanent restrictions have been altered since the case was settled in December 2001. And that the claimant quit or resigned from her job with the respondent once she sustained a subsequent, unrelated injury to her right wrist and was approved for and began receiving Social Security Disability benefits. Thus, respondent maintains claimant is not permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ set forth the facts in great detail, both as to the underlying claims⁵ and those that relate to this post-award request for modification and medical benefits. The

² ALJ Award (May 19, 2006) at 10 (emphasis in original).

³ *Id.* at 11. Based on the parties’ briefs, neither claimant nor respondent take issue with the ALJ’s findings with respect to TTD and medical payments, either authorized or unauthorized.

⁴ Claimant originally argued that she was entitled to permanent partial general (work) disability benefits under K.S.A. 44-510e(a). But after this case was tried and before this case was argued to the Board, the Kansas Supreme Court issued an opinion that negated any claim for work disability as her underlying injuries were no longer considered a whole body disability. *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

⁵ Docket No. 255,078 consists of a series of accidents culminating on January 27, 1999 and Docket No. 262,887 consists of a series of accidents beginning January 1998 through September 2000, both involving bilateral upper extremities. The parties agreed that January 27, 1999 would be considered the accident date for both claims.

Board need not restate the procedural history of this claim and the extensive history of medical treatment claimant has received. While the record contains a great deal of evidence and testimony the essential facts are not in dispute.

Claimant sustained a series of two separate bilateral injuries to her upper extremities while working for respondent. The first claim involved her activities in receiving and the second involved her activities as a checker. These claims were resolved by settlement on December 27, 2001. That settlement involved the payment of \$34,000, but no stipulation was reached nor any findings made pertaining to the nature and extent of the injury or whether the injury was a scheduled or whole body impairment, nor was there any allocation as between each claim.⁶

On September 1, 1999, claimant was placed in an accommodated position in respondent's fitting room. This job involved answering telephones, assisting customers in changing rooms and sorting rejected clothes. This job allowed claimant to work with just her right hand as her left hand is essentially useless due to Reflex Sympathetic Dystrophy (RSD) which emerged and has plagued claimant following her carpal tunnel surgery. Claimant worked in this position continuously until January 2003.

On January 17, 2003, claimant slipped on some ice and fell at home, fracturing her right wrist. Claimant asked for and received a leave of absence in order to recover from this injury. Claimant also applied for and was granted Social Security Disability benefits which were granted, retroactive to 2001, the date claimant originally applied (but was denied). On April 14, 2003, claimant advised respondent that she no longer wished to return to work and was resigning.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁷

⁶ ALJ Award (May 19, 2006) at 2.

⁷ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

For example, in *Wardlow*⁸, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The *Wardlow* Court looked at all the circumstances surrounding that claimant's condition including the serious and permanent nature of his injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

When considering whether claimant was permanently and totally disabled, the ALJ offered the following reasoning:

At the time of the settlement hearing on December 27, 2001, [c]laimant was working full time [sic], earning comparable wage, in a position within her permanent work restrictions. She thereafter unilaterally reduced her hours in an effort to qualify for Social Security Disability benefits. When that effort was unsuccessful, she continued to work a reduced schedule, and did not request to return to full-time status. The evidence presented establishes that [r]espondent accommodated [c]laimant with a real job, working as a fitting room clerk and telephone receptionist, within her permanent work restrictions and abilities. Claimant would still be employed by [r]espondent, performing those functions, and earning wages, but for her non-work-related fall of January 17, 2003.⁹

Thus, the ALJ found that claimant “failed to sustain her burden of proof that she has any additional functional impairment, work disability, or is permanently and totally disabled as a result of the progression of her work-related conditions since the settlement hearing held December 27, 2001.

Since the ALJ's Order, the Kansas Supreme Court has had occasion to reconsider and reinterpret K.S.A. 44-510c. In *Casco*, the Supreme Court enunciated a new methodology to analyzing claims involving multiple body parts. Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.¹⁰ Now post-*Casco*, the analysis changes somewhat. Now, apparently in any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.¹¹ When an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is

⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

⁹ ALJ Award (May 19, 2006) at 9.

¹⁰ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

¹¹ *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.¹²

In this instance, claimant is capable of engaging in substantial gainful employment, albeit in a very sheltered and accommodating work environment. Respondent has cobbled together a position for claimant so that she may work using only one arm. That position remains available to her. Her right wrist fracture has, by her own admission, healed, and was not the reason that she applied for and received Social Security Disability benefits. And while she may not be qualified for a job in the open labor market given the fact that her left hand is largely useless, respondent has provided a job to her and in fact, claimant performed that job from 1999 up until the time she chose to quit. There is nothing within this record to suggest that claimant is physically unable to perform this job, nor has any physician testified that claimant cannot do these limited work activities.

The Board has reviewed the extensive record and concludes, as the trier of fact, that claimant is permanently and totally disabled under K.S.A. 44-510c(a)(2). Claimant has sustained two separate bilateral upper extremity injuries. Claimant is presumptively permanently and totally disabled. However, that presumption is rebutted by the fact that respondent has made available to claimant a job that she can perform and which provides her a comparable wage, which the Board finds constitutes substantial gainful employment. Unless and until that job is no longer available to claimant, claimant's recovery is limited and she is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2). For these reasons, the ALJ's Order is affirmed, although for a different legal reasoning than found by the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated May 19, 2006, is affirmed.

¹² *Id.*, Syl. ¶ 9.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
 Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
 Bruce E. Moore, Administrative Law Judge